In the Supreme Court of the United States.

No. 264.

CITY OF RICHMOND, APPELLANT,

versus

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE.

Reply Brief.

As the opening note for the appellant discusses very fully all the questions affecting the merits of this litigation, this reply note will be confined to discussing the question as to the right of appeal, and then noticing briefly some positions assumed by the appellee.

RIGHT OF APPEAL.

The contention of the appellee is that the appeal should not have been taken from the Circuit Court to the Circuit Court of Appeals, and from the latter court to this court, but should have been taken from said Circuit Court directly to this court. It is alleged that that course should have been taken for three reasons.

1. That the final decree of the Circuit Court involved the construction or application of the Constitution of the United States.

2. That it involved the constitutionality of a law of the United States.

3. That it drew into question a State law claimed to be in contravention of the Constitution of the United States.

We submit that not one of these three alleged reasons existed in fact.

The real and only question presented in this case is whether the Act of Congress applies to the appellee. There are some subordinate questions therein, but they each and all spring out of this main question. We submit that for a cause to involve the "construction or application of the Constitution of the United States," the pleadings must present a direct appeal for protection under some specified clause of the Constitution. If no such appeal is made, but a statute of the United States is relied upon for relief, then the question is not as to the "construction or application of the Constitution," but as to "the constitutionality of a law of the United States."

In this case the bill nowhere claims protection under any specified clause of the Constitution, but specifically alleges that it relies upon the Act of Congress of July 24, 1866, for its rights. Hence under such pleadings the only question of a constitutional nature which can be raised, must be as to the constitutionality of that act. We therefore submit that the record nowhere involves the construction or application of the Constitution, as meant in the act creating the circuit courts of appeals. (26 U. S. Stat., 827, Sec. 5.)

It then remains to ascertain whether the constitutionality of the act so relied upon has been drawn in question. The record contains an opinion of the Circuit Court upon the demurrer filed by the appellant to the appellee's bill of complaint. Upon page 32 of the record it will be seen that this last-named court stated in its opinion that the city (the appellant) "conceded that such act was constitutional; that all the streets of the city of Richmond, which are letter-carrier routes, are post-roads within the meaning of said act, and that under the same a telegraph company can obtain a right of way for its poles and wires

through and along the streets of a city on the decisions of the Supreme Court of the United States."

On page 31 it further stated what was the contention or defence of the appellant. It said: "The insistance is that the complainant is a telephone company, and that said Act of Congress only embraces telegraph companies."

The record also contains the opinion of the Circuit Court of Appeals, and on page 87 that opinion contains this language: "At the bar the appellant declared the constitutionality of the Act of Congress of 1866 was recognized and admitted.

"That all streets which are letter-carrier routes are post-roads of the United States.

"That under the act of 1866 a telegraph company can obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality."

It cannot reasonably be contended in the face of these facts that the constitutionality of the said act was drawn in question. It is true that we denied that the appellee was embraced in the act. But that denial was as to the *scope* of the act, not as to its *constitutionality*.

On pages 87 and 88 the Circuit Court of Appeals states what were the questions before the court, and which were passed upon.

"First. Does the complainant come within the protection, and is it entitled to the privileges contained in the Act of Congress of 1866?

"Second. If it comes within the provision of that act, how far has it limited and restricted itself by accepting the provisions of the ordinance of the city of Richmond?

"Third. To what extent does the protection of the act of 1866 go? Does it make the company accepting it free of the control of the municipality in which it does business?"

The reply to the appellee's third reason is the same which we have offered to its first reason. The pleadings raise no such question. No clause of the Constitution was specified therein as violated by any State law or city ordinance. The pleadings only raise the question whether the appellee is embraced in the act of 1866, and, if so, whether the city ordinances interfere

with any right therein granted. The constitutionality of the Act of Congress was admitted, and the scope of the act only was in dispute—

1. As to whether it embraces telephone companies.

2. As to what is the extent of the protection afforded against local authorities.

In the light of the above facts, how could the appellant have appealed to this court? We had time and time again admitted the constitutionality of the act. We had again and again claimed that the only questions before the lower courts were as to the scope and applicability of said act of Congress.

According to the decisions of this court, we could not have appealed to it.

In *Cornell* v. *Green*, 163 U. S., 75-80, it was held:

"And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

See, also, *Ansbro* v. *United States*, 159 U. S., 695-7-8; *Borgmeyer, etc.*, v. *Idler*, 159 U. S., 408-414. See, also, *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S., 138.

In *Carey* v. *Houston, etc., Ry.*, 150 U. S., 170-181, it was held:

"In order to hold this appeal maintainable as within the second of the above-named classes (the fourth class in the enumeration of the statute), the construction or application of the Constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. *Horner* v. *United States*, 143 U. S., 570."

We also submit that as to the class of cases set forth in section 5 of the act of March 3, 1891, this court has not exclusive juris-

diction as to an appeal. By that section a party is given the right or option to appeal directly to this court, but he is not obliged to pursue that course. He can appeal in such cases to a circuit court of appeals, and from the latter court come here by writ of certiorari. See *McLish* v. *Roff*, 141 U. S., 661-668; *Barting* v. *Bank*, 1 C. C. A., 510.

OBJECTIONS TO THE CITY ORDINANCES ANSWERED.

After raising the question of appeal, which has just been noticed, the appellee makes its "statement of the case on its merits." On pages 8 and 9 of its brief it notices the ordinance of the city approved July 18, 1891. It alleges that there is no proof whatever that that ordinance was passed with the motive of lessening the number of poles on the streets of the city. We reply:

1. That the answer of the appellant, which is on this point responsive to the bill, distinctly alleges that the said ordinance was passed for that purpose. (See pages 36 and 37.) And no proof whatever has been offered to overcome that allegation in the answer.

2. There is no proof whatever offered that the city had at the time of the passage of that ordinance any quarrel or dispute of any kind with the appellee, and hence there is no reason to think that at that time, at least, the city was prompted by any ill will towards the appellee.

3. The ordinance shows upon its face that it is a general ordinance, applicable not to the wires and poles of the appellee alone, but to all wires and poles used for conveying electricity. It is, to say the least, a little removed from wisdom to hold that the city passed such an ordinance to spite the appellee. The ordinance shows upon its face that it could not have been passed with any motive other than alleged in the answer of the appellant. (See page 39.)

The appellee then proceeds to claim that the fact that the city has since then authorized another telephone company to

erect poles and run wires upon and over its streets, " negatives the assertion of the city on this point." We submit that that assertion is hardly satisfactory, either in fullness or frankness. It fails to state that the authority to the other company was not granted about the time of the passage of that ordinance, but was granted more than four years afterwards. It also fails to state that the authority to the second company, known as the Richmond Standard Telephone Company, was granted under the ordinances approved September 10, 1895, filed with the bill of complaint as Exhibits " G " and " H." It fails to state that under said ordinance " G," the second company bound itself to allow a joint use of poles, and would to-day have to allow the appellee company or any other telephone or telegraph company to share its poles, if required by the city so to do. Hence the city, in allowing the second company to occupy its streets, gave proof that it was sincere in desiring to prevent an unnecessary and a burdensome accumulation of poles in its streets, and that it believed that one way to prevent that evil was to require the joint use of poles.

The next allegation as to the facts made by the appellee in its brief is as to the " Cause of Controversy." Under that head it claims that the city repealed the ordinance of June 26, 1884, because the company would not agree to furnish certain 'phones to the city free of charge. The basis of this allegation is the correspondence between the City Engineer and the appellee. There was undoubtedly an effort made by some of the city's officials to obtain certain free 'phones. But there is undisputed evidence in the record that such officials had no power to speak for the City Council. (See statement on page 45.) But the refusal to furnish them was not the cause of the city's repeal of the ordinance of June, 1884. The answer of the city alleges " that it was influenced as much by the said persistent refusal of the complainant to accept the terms of the ordinance of July 18, 1891, as for any other reason to determine to repeal the said ordinance of June 26, 1884." (See page 37.)

The appellee, in his bill of complaint, shows how its refusal was regarded by some of those in authority in the city. It says:

"Threats were, however, made by some of those in authority in the said city that unless your orator submitted to the requirements of this ordinance, that it would be driven from the city, and its business broken up and ruined." (See page 6.) While the city denies that it ever authorized any one to make any threats against the company, these allegations show that one of the causes, if not the principal one, which led the city to pass the repeal ordinance was the refusal of the appellee to agree to the joint use of poles.

It is true that shortly after the said correspondence as to free 'phones was had, the City Council passed the said repeal ordinance. But we submit that this was a coincidence, and not a consequence. As we have shown, the Council had long been desirous of lessening the number of poles by requiring a joint use of them. In this she had been defeated by the appellee, and had been advised by the legal adviser of the city, that, in view of the rights of the appellee under the said ordinance of June 26, 1884, it could not enforce such a requirement against the appellee. (See Bill of Complaint, on page 8.) Hence the City Council knew that it could not put into operation its desire to require the joint use of poles, unless it should repeal the said ordinance of June 26, 1884.

At the time it passed the repeal ordinance, it had in view another scheme to reduce the number of poles—viz., by a system of underground conduits. (See Ex. C. of R., No. 3, on page 73.) That it desired a joint use of such conduits can be seen from the ordinance it subsequently adopted. (See pages 23 to 26.) As it knew that it could not force the appellee to a joint use of poles, until it repealed the ordinance of June, 1884, it is but fair to presume that it knew that it could not force the appellee to a joint use of conduits, except by such repeal. It desired to accomplish the said purposes. It knew that it could not accomplish these purposes without the said repeal. Hence the repeal. The Council also knew that said repeal could not go into effect for twelve months from the date of the passage of such repeal. Hence it passed the repeal ordinance some time before it passed the ordinances "G" and "H." We submit that we have shown

that the Council had two good reasons to induce it to pass said repeal. The record shows that after said repeal the Council proceeded to pass two ordinances to carry out such reasons or objects. Under such circumstances, is it not reasonable to hold that the Council was prompted by the two reasonable and proper purposes which we know it had, and which it subsequently embodied in two important ordinances, than to hold that it was led to pass the repeal ordinance because it could not get a few free 'phones? We submit that the facts in the record show that the appellee is mistaken in its view as to the "Cause of Controversy."

The next question discussed by the appellee in his brief is the "City Ordinances of 1895," being the ordinances marked "G" and "H," as exhibits with its bill of complaint. A comparison of the statement by appellee in his bill of complaint of the evil contained in those ordinances with the description and enumeration of the disasters to flow from them, as set forth in the said brief, will be not only interesting, but suggestive as to the sincerity of the appellee's latest manifestation of fear. In the said bill we find only the following single objection:

"Under one of these ordinances your orator was required (under penalty of ruinous and unreasonable fines) to petition for the privilege of erecting and maintaining poles and wires, where they now are, 'in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose.' And the very first condition to which this company would have to consent, if it made the petition, was, if the company failed to obtain permission asked for, to remove its poles and wires from the streets, and be liable to fines amounting to thousands of dollars for not doing so."

In its brief it devotes a half dozen pages to these ordinances, noticing each of the several sections and pointing out what it deems grave objections to several of them. This enlargement of its views has taken place since the judges of the lower court have commented unfavorably upon the said ordinances. Previous to those opinions the appellee, like the old lady, who

listened to her wrongs, as depicted by her counsel, the great orator Curran, did not know that the woes and wrongs were so numerous and so grievous.

The first objection made in the brief is as to the joint use of poles. We submit that the reasons for requiring a joint use of poles cannot be disputed. The objection is that no appeal is allowed to the courts from the committee or Council's decision. We submit no municipal government could be reasonably carried on, if every ordinance should authorize the persons exercising franchises to appeal to the courts as to every matter of detail. And surely municipal government must not be subverted, however desirable telephone companies may be. As to the comment that the City Engineer is authorized to appoint one of the arbitrators, the ordinance shows that that only happens where the company owning the poles refuses to appoint its arbitrator. Hence it has ample protection.

Then, section 4 is objected to because no appeal is allowed to the decision of the City Engineer as to the size, quality, etc., of the poles. The charter of the city, referred to in the record on pages 73 and 74, shows that the City Engineer is but a creature of the City Council, and hence that his rulings are always subject to reversal by the Council.

The objection to section 7 is the same as that heretofore noticed as made to the section as to the joint use of poles.

This seventh section shows what is meant by the power reserved in the first section. We have already noticed in our opening brief the forced construction put upon it by the appellee. To what we have already said we desire simply to submit the following notice of a decision of the Supreme Court of Pennsylvania upon a similar provision: The city of Philadelphia reserved the right in its ordinance to the Bell Telephone Company of "regulating or in any manner controlling telegraph or telephone companies in the use of the streets for telegraph or telephone purposes." The Supreme Court of Pennsylvania construed that provision as follows:

"Its authority thereafter was only that of regulation as to the use of the streets. * * * As already said, the power

of regulation includes the power to compel the adoption of reasonable and generally accepted devices which increase the safety and convenience of the public." *Com'lth* v. *Warwick*, 185 Pa., 623, 637, 640.

Even at this late day the appellee can find no objection to the other provisions of the ordinance "G." It passes them by with the single remark that, "Then follow other provisions, among them the threatened pole tax."

We have already discussed the reasonableness of said tax. We will merely add the following quotation from the opinion of the Supreme Court of Pennsylvania in the case of *Chester City* v. *W. U. Tel. Co.*, 154 Pa. St., 464-466, where the objection to such a tax was overruled:

"The difficulty is it does not go far enough It refers only to the usual, ordinary, or necessary expenses of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purpose specified in the affidavit."

We submit that the thirteenth and fourteenth sections of the ordinance "G" show that the appellant has recognized the very duties and burdens assumed by it, as mentioned in the above quotation.

The appellee then proceeds to offer objection to ordinance "H." It insists that the city has not proved that the removal of poles and overhead wires was intended to apply to the streets in the busier and more crowded portion of the city. Proof can hardly be required of a thing as to which no objection has been made, and as to which a natural presumption immediately and irresistibly arises. Certain it is that the ordinance does not require removal from all the streets, and common sense will teach

that such removal would be ordered from the more crowded thoroughfares, and not from the less frequented streets.

The appellee also denies the power of the city to order the wires to be run underground. We submit that, where the city is empowered to authorize the running of such wires "*along or* over," it would have to be a very narrow construction of municipal power to hold that it would not have the power to require them, as a matter of public safety and convenience, to be run underground. Especially in a case like this, where the city has granted in its charter the powers set forth on pages 44 and 45 of the record. We submit the following authority as conclusive upon this question, as it is the construction put by the Supreme Court of Virginia upon the charter of the city of Richmond: In *Terry* v. *Richmond*, 94 Va., 537-542, that court said: "The right of the Council to determine and designate the route and grade of any railroad to be laid in the city includes the authority to permit the railroad company to run under the street as well as upon it. The servitude is the same in each case."

It will not be denied that one of the cardinal rules for the construction of municipal powers is that a municipality possesses "those necessarily or *fairly* implied in, or incident to, the powers expressly granted." And surely the power to require the wires to be located under the streets is "fairly implied in" the power to authorize them to be run "along *or* over" such streets. When we recognize the liability of a municipality for the proper management and safe condition of its streets, as well as its duty to prevent any erection, which would increase the danger from fires, it is easy to see that the power claimed by the appellant is one "fairly implied in" the one expressly given.

A CARDINAL RULE OF EQUITY VIOLATED.

Upon page 19 of its brief the appellee says that it is ready to comply with "many" of the provisions of the said two ordinances. But it does not then point out, as it had not before that time ever pointed out, which of said provisions it was ready to comply with. This failure was intentional on its part. For

on page 20 it says: " It (the appellee) has not said which of the provisions of the ordinance were valid, and which were not, because there was no need at present to do so. It has merely said, you can't drive this company from your streets; you can't destroy its franchise and property."

It is true that the appellee has never specified heretofore which of the sections of the two ordinances it objects to, except the language as to the first or seventh section of the ordinance " G." It is true that in its bill it has claimed that its rights are " independent of and superior to the consent of the city of Richmond." But it has never before stated its position so defiantly. It virtually says: " You say that I may come upon your streets upon certain specified terms." I reply, " That I am going to stay where I am without agreeing to accept any of those terms. In fact, I refuse to designate which of the terms I object to. I shall simply declare in general terms that ' you can't drive this company from your streets; you can't destroy its franchise and property.' "

We respectfully ask: Has a litigant occupying public property, and asking equity of a court, a right to assume such a position? If it comes into court upon the plea that it is threatened with wrong, must it not specify the nature of the alleged wrong? What remedy can a court give it without accurately knowing of what it complains. Should a court follow the same general language and decree a general protection? It is true that the last sentence of the Circuit Court of Appeals in its opinion in this case did adopt very much that line of action. But we are here complaining of that decree.

We submit that the sentence now under notice from the appellee's brief shows that the whole bill in this case is based upon a wrong theory. If the complainant had any ground for equity interference it should have specified those grounds with such particularity as to inform the court exactly as to what it was willing to do, and as to what it ought not to be made to do. It had no right to come into court upon any general allegation of threatened wrong. As the city has the power to put all reasonable regulations upon the appellee, even if it comes within

the purview of the act of Congress of July 24, 1866, it should have specified which sections of the ordinances "G" and "H" it objected to, and which it deemed reasonable. Not having adopted that course, we submit its bill should have been dismissed, even if it were embraced within the terms of said act.

We submit that the appellee now sees the error it thus committed, and in its brief attempts to relieve itself of the effect of that error. On page 24 it claims that the Circuit Court having this litigation before it, involving the validity of the said two ordinances, enjoined the city from "preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties," and *dismissed the case from the docket*, with the view that hereafter the city could have the cause reinstated, and have the court determine which of the sections in either of the two ordinances were valid and binding. In other words, it is pretended that the Circuit Court perpetually enjoined the city from inflicting any fine or penalty under either of said two ordinances, without passing upon the validity of a single section in either of them. The difficulty of the situation must be very great which would suggest such an escape.

Even if such a peculiar construction can be imposed upon the intelligence of the Judge of the Circuit Court, certain it is that the decision of the Circuit Court of Appeals does not permit it. The latter court noticed many of the sections in the two ordinances, and then declared them invalid. But nowhere is any intimation given that a single line of them is valid and binding. Hence we submit that not only the complainant, but that both of the lower courts have proceeded upon a wrong theory as to the rights of the appellee, even if the company is embraced in the terms of the said act of Congress.

Upon the question of the construction of the act of Congress, we call attention to the case of *Central Un. Tel. Co.* v. *State, etc.*, 118 Ind., pages 194-209. In that case the court said: "Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been

granted some rights and privileges by acts of Congress which cannot be abridged or interfered with."

INTERSTATE COMMERCE.

The appellee, in discussing the connexion between itself and the Western Un. Tel. Company, uses this language: "The transmission of such messages over the wires would be useless without delivery, and their delivery would be impossible without transmission. * * The delivery is the very life of the message."

We reply that without the delivery of freight from the depot to the merchant, the purchase would be useless. Yet, will it be contended that the dray which hauls the freight is a part of the railroad, which is an instrument of interstate commerce? Such a contention will hardly be made. The process of interstate communication stopped when the freight reached the depot—the terminus of its interstate movement. Any means used to deliver it after that must be held to be a mere local "facility." So with the telegram, when it reaches the office in Richmond, it has reached the terminus of its interstate journey, and any means used to deliver it after it has reached such terminus must be a mere local "facility." In the case of the telegram, the cessation of the interstate movement is more marked than in the case of freight. For when the telegram reaches the office of the Western Union Telegraph Company it then changes its being; for it is there written out, and the written message is delivered to the clerk of the telephone company, who speaks it over the telephone wires.

We submit that however the telephone be looked at, it is a mere local "facility."

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C. V. MEREDITH.